

California Fair Political Practices Commission
MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox, and Swanson
From: Luisa Menchaca, General Counsel
Carla Wardlow, Chief, Technical Assistance Division
Subject: Project Proposals – Conflict of Interest Codes and Statements of Economic Interests
Date: March 29, 2002

I. INTRODUCTION

The Political Reform Act (the “Act”)¹ requires many public officials to disclose personal financial holdings that may be affected by their official duties. It does so through two vehicles: adoption of agency conflict of interest codes, and mandatory filing of individual Statements of Economic Interests (SEIs).

The Act requires every state and local agency in California to adopt a conflict of interest code.² Most of those codes currently are based on a “model code” contained in Commission regulations. (Regulation 18730.) All codes are subject to biennial review and amendment for changed circumstances and must be approved by a “code reviewing body.” The Fair Political Practices Commission (“Commission”) serves as the code reviewing body for all state and multi-county agencies, encompassing approximately 1,000 codes. (County boards of supervisors and city councils generally serve as the code reviewing bodies for approximately 6,000 local agencies.) From its inception, the conflict disclosure scheme was intended to be decentralized. (Section 87301.)

It is estimated that approximately 100,000 state and local officials and employees file SEIs. Certain high-level state and local officials are required to file SEIs; these officials are listed in section 87200 and include officials holding statewide elective office; members of the Legislature and certain key state commissions; judicial officers; and top county and city officials. Generally speaking, these individuals file statements when they become candidates and/or assume office, and file updated statements annually. Officials listed in section 87200 are subject to the most extensive disclosure requirements under the Act.

In addition, each agency code designates which employees and consultants within the agency must file SEIs. These individuals may be required to make only limited disclosures of their financial interests, depending on their duties. Those public officials who are required by their agency code to file disclosure statements are “designated employees” of state or local government agencies. (Section 82019.) Agencies are prohibited from requiring more disclosure than is necessary to comply with the Act. (*In re Alperin* (1977) 3 FPPC Ops. 77; *Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259.)

1. Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations. All references are to the Government Code unless otherwise noted.

2. The term “code” as used herein is in reference to an agency conflict of interest code.

Every public official is prohibited from making, participating in making or influencing a government decision that has a reasonably foreseeable material financial effect on his or her economic interests,³ *regardless of whether the public official is required to file a statement of economic interests or to disclose the particular economic interest that is affected.* (Sections 87100 and 87103.)

Disclosure and Disqualification Table

Public Officials (Section 82048)	Code Filers - Designated Employees (Section 82019)	Statutory Filers – Section 87200
Includes members, officers, employees or consultants of a state or local government agency. Does not include judges and court commissioners and members of the Board of Governors and designated employees of the State Bar of California, members of the Judicial Council, and members of the Commission on Judicial Performance.	Includes officers, employees, members, or consultants of any agency whose position with the agency is: exempt, elective (other than an elective state office), involved with state contracts, or <i>designated in a Conflict of Interest Code because the position entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest.</i> Does not include elected state officers, unsalaried members of any advisory boards or commissions, public officials specified in section 87200, and unsalaried members of the State Bar of California.	Includes elected state officers, judges and commissioners of courts, members of the PUC, members of the State Energy Resources Conservation and Development Commission, members of the FPPC, members of the California Coastal Commission, planning commissioners, members of the board of supervisors, district attorneys, county counsels, county treasurers, chief administrative officers of counties, mayors, city managers, city attorneys, city treasurers, chief administrative officers and members of city councils of cities, and other public officials who manage public investments, and candidates for any of these offices.
May not make, participate in making, or influence governmental decisions that will have a reasonably foreseeable material financial effect on his or her economic interests. <i>Disqualification applies even if there is no duty to file an SEI.</i> Duty to file depends on whether the official is a statutory filer (Section 87200) or a code filer (Section 82019).	Disqualification applies AND must disclose certain economic interests if makes or participates in making decisions that his or her agency has determined will potentially affect his or her financial interests. Duty to file within 30 days of assuming a position designated in his or her agency's conflict of interest code. (Reg. 18730.)	Disqualification applies AND must disclose certain economic interests enumerated in sections 87202 – 87210. Duty to file within 30 or 10 days of assuming office.

3. Economic interests triggering disqualification include investments worth \$2,000 or more, real property worth \$2,000 or more, sources of income aggregating \$500 or more, and sources of gifts aggregating \$320 or more. Interests held by an official's spouse and dependent children also trigger disqualification as well as business positions held by a public official and personal financial effects totaling \$250 or more in a calendar year. (Section 87103.)

Most SEIs are not filed initially with the Commission, but instead are filed directly with the state or local official's agency. The Commission reviews and retains approximately 20,000 statements of economic interests filed each year by the officials listed in section 87200, designated employees of the Senate and Assembly, members appointed to state boards and commissions, state department heads, and employees of certain multi-county agencies.

Statements of Economic Interests do not reveal whether a public official actually has a conflict of interest. Some common sources of potential conflict – e.g., one's personal residence – may not be required to be disclosed on the disclosure form (Form 700). Moreover, the form requires disclosure only of economic interests held in the preceding year, while the conflict-of-interest disqualification laws look to the official's current and future economic interests triggering the disqualification.

II. PROJECT PROPOSALS

To implement the Commission's goals and objectives for the year 2002, staff has identified a number of projects that may strengthen the Commission's role in the conflict/disclosure area. The Commission staff requests the Commission prioritize the projects. It is anticipated that under the current regulatory workplan for the year 2002, the staff will not be able to work on all the projects discussed below. Staff recommends the Commission dedicate its efforts first to Projects A.2 (advice/assistance, local government agencies), A.5 (classifications), A.6 (model categories), B.3 (candidate filings), B.2 (investments), and A.1 (code exemption requests).

A. CONFLICT OF INTEREST CODES – OVERVIEW OF THE LAW

Public agencies covered under the Act must have in place a code that is subject to the procedural and substantive requirements of the Act. Regulation 18730 (Exhibit A) embodies a model code and regulations 18750 and 18750.1 embody the procedures for the development of state and multi-county codes. Regulation 18751 embodies a process for requesting an exemption from the code requirement for agencies for which the Commission is the code reviewing body. Pursuant to section 87306(a), every agency shall submit amendments to its code as may be necessitated by changes in circumstances (e.g., creation of new positions).

An agency's code is a fundamental tool in effectuating the prohibition against public officials making governmental decisions in which they have a financial interest as embodied in sections 87100 and 87103. Generally, a code must specifically enumerate positions that will have a potential for a conflict of interest in their decision-making, and set out requirements for such positions with regard to reporting of their economic interests on SEIs. (Section 87302.) Agencies covered under the Act have an obligation to make amendments to their codes "when change is necessitated by changed circumstances...." (Section 87306.)

Review and preparation of the state agency codes is subject to the Administrative Procedure Act (APA). (Section 87311.) As such, amendments to codes are treated in the same manner as other regulatory changes.

The Act establishes deadlines for the adoption or amendment of codes. A new agency must submit a code no later than six months after it comes into existence. (Section 87303.) Amendments must be submitted within 90 days after changes necessitating an amendment become apparent. (Section 87306.) Within 90 days after receiving the proposed code or proposed amendments or revisions, the code reviewing body is to: approve it, revise and approve it, or return it to the submitting agency for revision and resubmission within 60 days. (Section 87303(a)-(c).) If a state or local agency fails to adopt a code or amendment, the code reviewing body, the Commission, or a superior court may take action to adopt or order the adoption of a code. (Sections 87304, 87305, and 87307.)

The substantive standard of review of a code by a code reviewing body is set forth at section 87309 as follows:

“No Conflict of Interest Code or amendment shall be approved by the code reviewing body or upheld by a court if it:

- (a) Fails to provide reasonable assurance that all foreseeable potential conflict of interest situations will be disclosed or prevented;
- (b) Fails to provide to each affected person a clear and specific statement of his duties under the Code; or
- (c) Fails to adequately differentiate between designated employees with different powers and responsibilities.”

In the Commission’s *Alperin* opinion, the Commission held that subdivision (c) of section 87309 prohibits an agency from requiring disclosure of financial interests which may not be foreseeably materially affected by decisions of employees in their designated position(s). In advising and reviewing codes, Commission staff follow the specific tailoring directive of *Alperin*. (*Hoffman* Advice Letter, No. A-98-084; see also *Marks* Advice Letter, No. A-98-073; *Rypinski* Advice Letter, No. I-90-513.) As such, agencies must specifically tailor the financial disclosure requirements of their codes to the financial interests of designated employees that “may be affected materially” by decisions of such employees based upon the duties of their respective positions.

The Commission is the “code reviewing body” for proposed codes filed by state agencies outside of the judicial branch and by government agencies having jurisdiction in more than one county. (Section 82011(a).) Currently, the Commission’s Director of Governmental Affairs keeps the Technical Assistance Division (TAD) apprised of the creation of new agencies, and the division works with the Governor’s Office to assure that it is informed of new agencies created by executive order. The division staff works with agencies on an informal interactive basis to assist them in developing appropriate codes. This “user-

friendly” approach usually results in expeditious resolution of problems with proposed codes. While TAD works with new agencies to meet the time frames set forth in section 87303, some new agencies may not meet the deadlines for submission. Since the filing obligations of individuals who file pursuant to a code are triggered by the existence of an approved code, this creates problems when public officials make and participate in decisions over an extended period of time. Since they are not required to file an SEI, members of the public who use the SEIs to determine potential conflicts are not on notice of the public official’s involvement in governmental decisions.

Although regulations 18730, 18750, 18750.1, and 18751 set forth fairly specific procedures for code establishment, review and response, staff recommends that staff review the overall code review/exemption request process to develop an optimum approach to resolving various issues discussed below (Projects 1 – 7).

1. Conflict of Interest Code Exemption Requests Under Regulation 18751.

Regulation 18751 (Exhibit B) sets forth a procedural framework for the submission and consideration of requests by a public agency for an exemption from the requirement that it submit a code under section 87300. It applies only to agencies where the Commission is the “code reviewing body,” but it encourages other code reviewing bodies to adopt similar procedures for exemption requests. (Regulation 18751(a).)

A request for an exemption is submitted to the Executive Director of the Commission. The two primary bases under which an exemption may be granted are: where the agency has no “designated employees,” or where the agency “is, or will soon be, inoperative or nonfunctioning.” (Regulation 18751(c).) There is also a “catch-all” provision characterized as a “discretionary” exemption. (Regulation 18751(e); *Paetzold* Advice Letter, No. I-01-027.)

Within 90 days of the receipt of an exemption request, the Executive Director of the Commission is to approve it, deny it, or return it to the requestor for additional information and resubmission within 60 days. If the request for exemption is approved, the Executive Director issues an exemption letter to the requesting agency. If the request is denied, the Executive Director issues a letter denying it and establishing a new deadline for submission of a proposed code. (Regulation 18751(h)-(j).) Any “interested party” may request reconsideration by the Commission of either an approval or denial of an exemption. (Regulation 18751(i), (j).) The Chairman considers these request(s), and if in his or her discretion “good cause” exists, he or she schedules the matter for hearing before the Commission. There are no prescribed time frames under the regulation for requesting reconsideration.

The above procedures for review of and response to code exemption requests set forth in regulation 18751 have not been consistently followed when requested as written advice pursuant to section 83114. The issue is often framed as whether officials in a given agency are covered by the conflict-of-interest

disqualification provisions of the Act (section 87103), as opposed to straightforward requests for code exemptions (sections 87300-87312). These requests do not appear

to have been attempts to circumvent the exemption procedures; however, they have resulted in advice letters being the predominant vehicles for responses that result in de facto exemption requests.⁴ Requests for exemptions by local agencies have similarly been the subject of response by advice letters.⁵

Notwithstanding this practice, there have really been no major repercussions that have developed. It has served the purpose of expeditious resolution for the requestors. However, the use of advice letters to respond to requests for exemptions raises due process considerations and creates confusion about the authority of local code reviewing bodies to make these determinations. Because of this, the Commission staff is now strictly following the procedure set forth in regulation 18751. There are, however, some ambiguities and gaps in the regulation that may warrant consideration by the Commission.

The first issue is development of a streamlined procedure for determining whether regulation 18751 or an advice letter is an appropriate vehicle for handling a request. It may be appropriate to develop a screening process for advice requests and requests to TAD staff to assure that they are not de facto code exemption requests. Specifically, the advice requests may be couched in terms of whether a given commission or board has “designated” employees because of the “solely advisory function” of the commission or board. (Regulation 18701⁶; *Kramer* Advice Letter, *supra*, No. A-90-717; *Graff* Advice

4. See *Paetzold* Advice Letter, *supra*, No. I-01-027; *Williams* Advice Letter, No. A-99-020; *Williams* Advice Letter, No. A-98-162; *Kramer* Advice Letter, No. A-90-717.

5. See *Dostart* Advice Letter, No. A-00-022; *Biddle* Advice Letter, A-93-390; *Mallery* Advice Letter, No. I-88-335; *Miller* Advice Letter, No. A-77-272.

6. Regulation 18701(a) provides:

“(a) For purposes of Government Code Section 82048, which defines ‘public official,’ and Government Code Section 82019, which defines ‘designated employee, the following definitions apply:

(1) ‘Member’ shall include, but not be limited to, salaried or unsalaried members of committees, boards or commissions with decisionmaking authority. A committee, board or commission possesses decisionmaking authority whenever:

(A) It may make a final governmental decision;

(B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden; or

(C) It makes substantive recommendations that are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.”

Pursuant to this regulation, a member of an advisory board may not be considered a public official for all of the purposes of the Act (disqualification and disclosure). However, this does not necessarily mean that the board or commission will not be included in a conflict of interest code. For example, an advisory board may have employees that should be designated in a code.

Letter, No. I-87-153; *Sedell* Advice Letter, No. A-86-234; *Baxter* Advice Letter, No. A-86-234.) Others may take the form of requests for advice as to whether a given entity is a public agency covered by the Act. (*Dostart* Advice Letter, *supra*; see *In re Siegel* (1977) 3 FPPC Ops. 62 .) And, of course, there are straightforward code exemption requests that are made in the form of advice requests. (*Williams* Advice Letter, *supra*, No. A-99-020; *Williams* Advice Letter, *supra*, No. A-98-162.) While it may not be too difficult to sort out the exemption requests from other advice requests, it will be necessary to implement a procedure for identification and referral of these requests at the intake stage. Code exemption requests for agencies where the Commission serves as the “code reviewing body” should be referred to the process set forth in regulation 18751. All other code exemption requests should be referred to the appropriate “code reviewing body.”

2. Commission Role – Local Government Agencies

A related issue impacts the Commission’s role with respect to local government agencies. The Commission is empowered to provide assistance to agencies and public officials in administering the provisions of the Act. (Section 83113(c).) The Commission is also empowered to issue any appropriate order directed to an agency or take any other appropriate action, including the adoption of a conflict of interest code, when its code reviewing body has failed to issue an appropriate order or take other action. (Section 87304.) Also, the Commission shall, upon request, provide technical assistance to agencies in the preparation of Conflict of Interest Codes. (Section 87312.)

It has been the Commission staff’s experience that local code reviewing bodies and employees of local agencies who disagree with their agency’s determination increasingly ask the Commission to render advice concerning a determination that must be made by the code reviewing body. For example, a decision about whether a new agency or a subdivision of an agency must create a new conflict of interest code is a determination that must be made by the code reviewing body. The remedy for an employee who disagrees with his or her agency’s determination is to petition the agency to amend its code. (Section 87307.) Ultimately, a judicial remedy is available. (Section 87308.) If the agency asks whether its determination is correct, the Commission is able to render written advice because it is ordinarily responding to a factual determination posed by the agency as to whether an individual “makes” or “participates in the making” of a governmental decision. Streamlining the request and exemption process may not be sufficient to address this issue. It may be appropriate to amend regulation 18329, which describes what constitutes a request for formal or informal written advice.

This has increasingly become a problem. The questions are often linked to a disqualification issue. Under section 87100, a public official may not make, participate in making, or influence a governmental decision. Pursuant to section 83114, any public official may seek written advice to determine whether a particular factual situation requires the official to disqualify himself or herself from the decision. The question may be posed, for example, by a consultant who seeks a determination as to whether he or she is “making” a governmental decision or “participating in the making” of a decision. Individuals may provide facts

suggesting a regulatory exception applies.

The employing local agency may have determined that the “consultant” should file an SEI.

Interpretation of section 87100 is a question properly posed by a public official. However, when posed as a question that can result in a challenge of a local agency’s determination that the individual makes or participates in making decisions, it impacts the code process (i.e., an agency’s determination that an individual is a designated employee who should file an SEI). With respect to local agency codes, the Commission renders “technical assistance” at this stage. (Section 87312.) This project entails clarifying when individuals who work for local agencies and those agencies may seek advice and/or assistance from the Commission concerning the disclosure and disqualification provisions of the Act.

3. Other Procedures Pertaining to Regulation 18751

Another issue pertains to examining what other procedures should be in place concerning regulation 18751. If an exemption request is approved by the Executive Director, the agency is notified by letter. However, interested parties have a right to request reconsideration of the Executive Director’s decision by the Commission. (Regulation 18751(i).) The Executive Director may also return the exemption request to the agency for submission of additional information within 60 days. (Regulation 18751(h)(3).) Upon resubmission of the request with the additional information, the Commission has 60 days to grant or deny the request for exemption.

If the request is denied, the regulation provides for inclusion of a new deadline for submission of a code proposal. (Regulation 18751(j).) A denial also gives rise to interested parties’ right to request reconsideration of the Executive Director’s decision by the Commission. One of the problems with the regulation’s treatment of these issues is that few time frames for these actions are provided. Also, while regulation 18751 provides for interested persons to request reconsideration, it does not provide any notice mechanisms, except to the requesting agency. The Commission may want to include an instruction that notice of the grant or denial of an exemption request be given to all interested parties by the requesting agency. Appropriate time frames should be established for the exercise of rights and the fulfilling of statutory obligations, particularly the ultimate adoption of a code by an agency that has unsuccessfully applied for an exemption. (See section 87303.)

Along with streamlining the process, it is recommended that the Commission examine the procedural requisites for the Executive Director’s consideration and determination of an exemption request.

4. Entities Which Are Not State Agencies

This project pertains to state entities that do not develop a code, or are covered under another agency’s code, and which do not request exemptions as provided in the regulation. As noted, staff has established procedures to receive notification when a new state agency is created, either by legislation or

executive order. As part of this process, the TAD staff contacts those agencies to initiate the code process. Most agencies work closely with the division to develop and eventually have a code approved by the Executive Director. Some agencies may not believe they are a state agency and therefore do not believe the code process should be initiated. The TAD will refer the matter to the Legal Division. If the Legal Division staff determines that the agency is or is not a state agency within meaning of the Act, there is no current method for review or approval of the staff's determination by the Executive Director or the Commission. It may be necessary to amend regulation 18751 to establish a procedure for handling these matters.

5. Conflict of Interest Codes – Placement of Positions/Classification in Appropriate Disclosure Categories

Public officials who make or participate in the making of governmental decisions are required to file SEIs. Appointees to newly created state boards, commissions or task forces may have an obligation to complete Form 700. A review of duties and responsibilities is required and a determination made on whether the duties include the making of governmental decisions or whether the board or commission is solely advisory in nature, in which case they are not public officials. If the newly created body is part of a larger agency, this often means the agency must determine whether to include the officials in its code or whether a separate code is required. If it is an entirely new body, the analysis is still required although who initiates the action may differ.

A position is designated for inclusion in an agency's conflict of interest code "because the position entails the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest." (Section 82019.) Regulation 18730(b)(2) provides, "It has been determined that these persons make or participate in the making of decisions which may foreseeably have a material effect on financial interests."

In placing designated positions into the various disclosure categories, agencies must tailor the level of disclosure to the decision-making of a position and the foreseeability of a financial effect on an economic interest as a result of such decision-making. Toward this end, presumably most agencies review the duty statements for the positions to make their determinations.

To determine the designated positions, many state and local agencies use civil service classifications, but because not all positions within a classification may be designated in a code depending on the work performed, working titles are often used in a code. Examples of working titles include "project manager" and "Assistant General Counsel." In addition, the term "consultant" refers to individuals who work in a staff capacity covered by many civil service classifications, such as engineer, staff counsel, planner, etc.

State agency codes are adopted pursuant to procedures provided for in the Administrative Procedure Act. Therefore, employees have public notice of adoptions and amendments. When working titles are used, questions sometime come up as to whether employees had sufficient notice of their filing

obligation.

The Commission should examine whether the procedures for adopting codes and/or the model code in regulation 18730 should include civil service classifications when working titles are used. This would include examination of whether the Commission should impose a specific timeline for an agency's determination that a consultant has an obligation to file or a timeline when only working titles are used.

6. Model Disclosure Categories

Most agencies have adopted the model code. (Regulation 18730.) During the course of the Filing Officer Outreach Program, staff has conducted an informal review of local agency codes. Many of them require overly broad disclosure for designated employees, or do not provide for disclosure by consultants. The Commission may want to explore whether the Commission should develop model disclosure categories to assist agencies in crafting their codes. Many local agencies request assistance in this process. (Section 87312.)

7. Commission Role – Section 87200

When section 87200 was amended to add “other public officials who manage public investments,” the Commission spent months attempting to define which officials were covered by the new provision. For purposes of disclosure, these officials were no longer required to file statements of economic interests under their agencies' codes. As agencies were amending their codes to remove them, questions were raised whether the code amendments would cause confusion for filers, filing officers, and the public. Would the filers and the public understand that removal from the code did not mean the officials were being excused from disclosure and disqualification? Would filing officers remember to obtain statements from filers no longer covered by the code? To lessen the confusion, staff recommended that agencies identify these officials somewhere in the code as 87200 filers.

As part of their ongoing review process, agencies continue to change employee designations, determining that an employee designated in a code as making or participating in making decisions relating to public investments should file under section 87200, not the agency's code. “Statutory filers” have broader reporting requirements under the statute, and their filing obligation is triggered by the statute, not an agency's code. This sometimes raises questions about whether an employee who disagrees with his or her agency's determination that a “code filer” should now be a “statutory filer” should seek written assistance from the Commission or petition his or her agency through the code amendment process. It has also raised questions about whether what was initially an informational item listing those individuals who are considered by the agency to be section 87200 filers is now viewed by many state and local agencies as being part of the agency's code. This is not appropriate since section 87200 filers have obligations not triggered by the

existence or amendment of a code.

This project would entail examining what procedures should be followed when agencies amend a code to include or exclude an individual who manages public investments.

B. DISCLOSURE ISSUES

1. Assuming Office Statements of Economic Interests

Officials specified in section 87200 file SEIs within 30 days of assuming office, or within 10 days of appointment or nomination if the position is subject to senate or judicial confirmation. (Section 87202.) Officials appointed to an agency with an existing code file the SEI within 30 days of assuming office, or within 30 days of appointment or nomination if the position is subject to senate confirmation. (Section 87302(b).) Officials appointed to a newly created agency have no duty to file an SEI until 30 days after the agency's code is adopted and approved unless they fall under the section 87200 category of "public officials who manage public investments." However, as discussed earlier, a new agency has up to six months to submit a code, which then undergoes review by the code reviewing body before it goes into effect. Thus, officials appointed to newly-created agencies may have no SEI filing obligation for nine months or more. The Commission may want to review whether to require earlier filing by high-level officials appointed to newly created boards, commissions, or other agencies.

2. Definition of Investment

The definition of "investment" in section 82034 excludes "a time or demand deposit in a financial institution, shares in a credit union, any insurance policy, interest in a diversified mutual fund registered with the Securities and Exchange Commission under the Investment Company Act of 1940 or a common trust fund which is created pursuant to Section 1564 of the Financial Code, or any bond or other debt instrument issued by any government or government agency." These exceptions have been in place since 1978, when mutual funds and common trust funds were added to the list.

Since that time, many new investment vehicles have been created. Some of the investments filers frequently ask about are REITs, managed accounts, and index funds, as well as IRAs, 401(k) plans, and other retirement funds. Educational workshops for staff in the many types of investment vehicles are being planned. The question is whether staff should dedicate resources to determine whether the Commission should sponsor legislation to amend the definition of investment to reflect current investment vehicles. One of the complaints staff receives from filers with respect to investments not exempt from this definition is that they are required to report and disqualify with respect to investments which the filer does not control.

3. Candidate Filings

Section 87201 requires candidates for offices specified in section 87200 to file an SEI along with the declaration of candidacy (filed under the Elections Code). Section 87201 also contains an exception for candidates who have filed, within the previous 60 days, an annual or assuming office statement. This exception was created when the state primary election was held in June and it allowed elected officials to avoid filing overlapping annual and candidate statements when they are running for reelection.

With the March primary election, the declaration of candidacy is filed during the second week of December. Candidates running for reelection must file the candidate statement, covering through the first part of December, and must then file an annual statement covering the same period, plus the two or three weeks not covered by the candidate statement. The Commission has attempted to simplify the process by approving the Form 700 Certification (Exhibit C), which allows an elected official to state on the annual filing deadline that all reportable information is contained on the candidate statement, or to attach amended schedules adding any new information. Unfortunately, this still causes much confusion and in some cases, misfiled statements. Staff would like to explore a statutory or regulatory solution to the problem.

4. Gifts and Travel Payments

Section 89506 provides exceptions to the Act's gifts limits for certain types of travel by public officials. Section 89506 states:

“(a) Payments, advances, or reimbursements, for travel, including actual transportation and related lodging and subsistence that is reasonably related to a legislative or governmental purpose, or to an issue of state, national, or international public policy, are not prohibited or limited by this chapter if either of the following apply:

(1) The travel is in connection with a speech given by the elected state officer, local elected officeholder, candidate for elected state office or local elected office, an individual specified in Section 87200, member of a state board or commission, or designated employee of a state or local government agency, the lodging and subsistence expenses are limited to the day immediately preceding, the day of, and the day immediately following the speech, and the travel is within the United States.

(2) The travel is provided by a government, a governmental agency, a foreign government, a governmental authority, a bona fide public or private educational institution, as defined in Section 203 of the Revenue and Taxation Code, a nonprofit organization that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, or by a person domiciled outside the United States which substantially satisfies the requirements for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code.

(b) Gifts of travel not described in subdivision (a) are subject to the limits in Section 89503.

(c) Subdivision (a) applies only to travel that is reported on the recipient's statement of economic interests.

- (d) For purposes of this section, a gift of travel does not include any of the following:
 - (1) Travel that is paid for from campaign funds, as permitted by Article 4 (commencing with Section 89510), or that is a contribution.
 - (2) Travel that is provided by the agency of a local elected officeholder, an elected state officer, member of a state board or commission, an individual specified in Section 87200, or a designated employee.
 - (3) Travel that is reasonably necessary in connection with a bona fide business, trade, or profession and that satisfies the criteria for federal income tax deduction for business expenses in Sections 162 and 274 of the Internal Revenue Code, unless the sole or predominant activity of the business, trade, or profession is making speeches.
 - (4) Travel that is excluded from the definition of a gift by any other provision of this title.
- (e) This section does not apply to payments, advances, or reimbursements for travel and related lodging and subsistence permitted or limited by Section 170.9 of the Code of Civil Procedure.”

Commission regulations relating to travel payments received by public officials create confusion for filers. (Regulations 18950.1 and 18950.3.) Some travel payments are not reportable or subject to the gift limits. (Section 89503.) Some travel payments are not subject to gift limits but are reportable. Some travel payments are subject to both limits and reporting. For example, when an official makes a speech, section 89506(a)(1) provides that lodging and subsistence received the day before the event, the day of the event, and the day after the event are not subject to the gift limit. However, regulation 18950.3 states that “necessary lodging and subsistence provided directly in connection with” an official’s speech are not reportable or subject to limit. This means that lodging and subsistence provided the day before and/or the day after may be reportable gifts because they are not directly in connection with the speech, even though they are not subject to limit.

In addition, most travel payments provided by governmental entities, 501(c)(3) and certain other organizations are not subject to limit. (Section 89506(a)(2).) However, they are reportable unless they are received from the official’s own agency or are “reimbursements for travel expenses or per diem” received from a 501(c)(3) organization. (Section 82030(b)(2).) The Commission may want to determine whether legislative or regulatory changes are needed to simplify reporting questions concerning travel.

C. FILING OFFICER ISSUES

1. Filing Officer Duties

Filing officer duties are specified in section 81010:

“With respect to reports and statements filed with him pursuant to this title, the filing

officer shall:

- (a) Supply the necessary forms and manuals prescribed by the Commission;
- (b) Determine whether required documents have been filed and, if so, whether they conform on their face with the requirements of this title;
- (c) Notify promptly all persons and known committees who have failed to file a report or statement in the form and at the time required by this title;
- (d) Report apparent violations of this title to the appropriate agencies; and
- (e) Compile and maintain a current list of all reports and statements filed with this office.”

Regulation 18115 (Exhibit D) further specifies the duties of filing officers with respect to statements of economic interests. Should there be a regulation defining “promptly” for purposes of section 81010 to impose a filing officer deadline for notifying officials who have failed to file statements? The existence of regulatory guidelines may encourage filing officers to establish adequate procedures for identifying late filers, ultimately resulting in public filings that are useful to members of the public who monitor activities of the public.

Also, regulation 18115(a)(4) provides that filing officers shall:

“Review the information contained in at least 20 percent of the statements which are filed on time, at least half of which must be selected on a random basis, and the information contained in all statements which are filed late, to determine whether:

- (A) The summary page is completed correctly, and all schedules applicable to the filer are either attached or checked ‘no reportable interests.’
- (B) The attached schedules include all required descriptive information for each financial interest.
- (C) Information contained on one schedule suggests that required information is omitted on either that schedule or another schedule.”

It is unclear whether the 20 percent level of review is sufficient to determine filers’ level of compliance with the disclosure laws. The Commission may want to examine whether filing officers should be required to fully review more than 20 percent of the statements.

2. Imposition of Late Filing Penalties

In addition to other enforcement penalties, filing officers can impose late fines on filers who file reports or statements after a deadline. (Section 91013.) For statements of economic interests, the maximum fine under this section is \$100. Fines can be reduced or waived if on an impartial basis the filing officer determines that the late filing was not willful and that enforcement of the fine will not further the

purposes of the Act. Once the filing officer has sent specific written notice to a filer that he or she has missed the deadline, a fine cannot be waived if the filer does not respond within 30 days. (Section 91013(a).) In 1979, the Commission approved guidelines for waiving late filing penalties for officials whose statements are filed with the Commission. Commission staff recommends that the Commission formally adopt the guidelines in a regulation for use by all filing officers and enforcement staff. (See attached guidelines, Exhibit E.)

Attachments

Regulation 18730 – Exhibit A
Regulation 18751 – Exhibit B
Form 700 Certification – Exhibit C
Regulation 18115 – Exhibit D
Waiver Guidelines – Exhibit E